SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1867

JACOB SCHEIN and
MARVIN H. SCHEIN, *Petitioners*

v.

CAESAR'S WORLD, INC., CLIFFORD S. PERLMAN, STUART Z. PERLMAN, WILLIAM H. McELNEA, JR., JAY E. LESHAW, HAROLD E. CAMPBELL, JR., BERTIN J. PEREZ, L. JOHN POLITE, JR., and MELVIN CHASEN, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MITCHELL A. KRAMER
Counsel for Petitioners

Of Counsel:
KRAMER and SALUS
313 South Seventeenth Street
Philadelphia, Pennsylvania 19103

THE LEGAL INTELLIGENCER, 99 NORTH JUNIPER STREET, PHILA., PA. 19107

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

The petitioners, Jacob Schein and Marvin H. Schein, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals in this proceeding on March 15, 1974.

OPINION BELOW

The opinion and judgment of the Court of Appeals, reported in 491 F.2d 17 (1974), appears as Appendix A hereto. The opinion of the United States District Court for the Southern District of Florida, as yet unreported, appears as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 15, 1974. The jurisdiction of this Court is invoked under Title 28 U.S.C.A. §1254(1).

QUESTIONS PRESENTED

(1) Were the principles of liberal discovery and adequate preparation time for trial by jury violated by the granting of summary judgment for respondents while the Court had before it a motion to compel discovery, where depositions were not completed and where respondents withheld material facts?

(2) Did the trial judge violate petitioners' right to jury trial by granting a Rule 56 motion prior to the completion of discovery?

(3) Did the trial judge violate F.R.C.P. 56 by ignoring factual issues in dispute?

(4) By granting summary judgment did the Court rule incorrectly on the Florida Business Judgment rule for Corporate Directors and Officers?

STATUTORY PROVISIONS INVOLVED

Rule 56, Federal Rules of Civil Procedure, is set out in Appendix C.

STATEMENT OF THE CASE

This is a derivative suit brought by shareholders of respondent Caesar's World, Inc. (herein CW) against the officers and directors of CW. The suit seeks damages of approximately $9,000,000.00 for alleged mismanagement of respondents in causing CW to lose an asset of that value. The action was originally brought in the Southern District of Florida. The jurisdiction of that Court was invoked under 28 U.S.C.A. §1332.

CW's subsidiary, Desert Palace, Inc. (herein DP) owned a gambling casino in Las Vegas, Caesar's Palace. Centronics Data Computer Corporation (herein Centronics) designed and manufactured a computerized system for gambling casinos. On March 2, 1971, CW and Centronics entered into two agreements, one designated "lease" which was really an agreement to enter into a lease, and the other an assignment of contract rights. The assignment provided that CW could purchase 510,000[1] shares of Centronics common stock at $3.33 per share. The lease provided that there was attached to it an Exhibit "C", a lease of the computer system Under these agreements Centronics could repurchase 255,000 shares of its stock unless CW entered into the "Exhibit C" lease. In fact, respondents never prepared the "Exhibit C" lease (see Record p. 1071) and therefore had no way of preventing the recapture of the stock.

On April 19, 1972, Centronics notified CW it was exercising its option to repurchase its 255,000 shares. Prior to that date CW's officers did not attempt to prepare the Exhibit "C" lease and apparently did not analyze the agreements with Centronics so as to determine that this had to be done to preserve the Centronics stock.

After April 1972, CW and Centronics entered into negotiations culminating in CW returning 155,000 shares of Centronics stock (then worth over $9,000,000.) and

1. This gives effect to a subsequent three for one stock split. Originally only 170,000 shares were involved.

entering into a $10,000 per month lease of a computer system which was finally drafted.

Petitioners filed their original complaint on March 1, 1973. Answers from all respondents except Howard E. Campbell and William McElnea, Jr. were received by April 19, 1973. A default judgment was entered against Harold E. Campbell on July 11, 1973, which was later set aside on August 13, 1973. William McElnea, Jr. was finally served by means of an Alias Summons on August 8, 1973. He answered on August 15, 1973.

Meanwhile, depositions of Centronics President, Robert Howard was scheduled for July 17, 1973, in Nashua, New Hampshire and held July 19, 1973. Depositions were scheduled for the individual respondents. Messrs. S. Perlman, Perez, Sheehan and Chasen were deposed on July 26, 1973, in Miami, Florida. Mr. Leshaw was deposed the next day. Clifford Perlman was not present in Miami despite the Court's denial of respondents' motion for a protective order and his deposition was delayed until August 15, 1973, in Las Vegas, Nevada.

As respondents were not cooperating in discovery and were not producing all their witnesses or all their documents, petitioners requested a continuance of the Pre-trial Conference and trial originally scheduled for August 15, 1973, and August 20, 1973. On August 3, 1973, the request was granted and the Pre-trial and trial continued to September 13, 1973, and September 17, 1973, respectively.

Respondents filed a Motion to require security for costs on August 17, 1973. A hearing was scheduled for August 30, 1973, and held on August 31, 1973.

Petitioners still had not completed discovery and filed a motion to compel discovery. Petitioners also moved to amend their complaint. All these matters were considered at the August 31, 1973, hearing. William H. McElnea, Jr., and John Polite, Jr. were finally deposed on September 5 and 6, 1973, in Los Angeles, California, although the transcript of their depositions was not filed until November 12, 1973.

The trial judge granted respondents' motion for summary judgment on September 12, 1973, despite the fact that he never ruled on Petitioner's Motion to Compel Discovery and despite the fact that respondents had not yet filed all of the depositions taken by petitioners.

The Court of Appeals affirmed the decision of the District Court, adopting the opinion of that Court.

REASONS FOR GRANTING THE WRIT

I. In granting summary judgment to respondents before petitioners' discovery was completed and permitting respondents to withhold material facts, the principles of liberal discovery and adequate preparation for trial by jury were violated.

A basic tenet of the Federal Rules of Civil Procedure is that pre-trial discovery must be "accorded a broad and liberal treatment." *Hickman v. Taylor*, 329 U.S. 495 (1947). "The purpose of F.R.C.P. is not to cut litigants from their right to trial by jury if they really have issues to try." *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944). In *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962), this Court announced the policy that summary judgment should be granted sparingly in cases where motive is important and evidence is in the moving party's hands, since "trial by affidavit is no substitute for trial by jury which has so long been the hallmark of even handed justice." 368 U.S. at 473. *Poller's* policy has been followed by this Court in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *White Motor Co. v. United States*, 372 U.S. 253 (1963); *Norfolk Monument Co. v. Woodlawn Memorial Gardens*, 394 U.S. 700 (1969). See also, *Schoenbaum v. Firstbrook*, 405 F.2d 215 (2nd Cir. 1968).

In the present case, petitioners have been denied the procedural right to be able to adequately present to the trial court material facts needed to preclude the granting of summary judgment for respondents. The trial judge's zeal to dispose of the case forced petitioners into a whirlwind schedule of pleading and discovery which culminated when summary judgment was granted on September 12, 1973, slightly more than six months after the complaint was filed on March 1, 1973. As petitioners were seeking to prove mismanagement of the corporation, a subject which was within the exclusive control of the respondents, extensive discovery was necessary. Petitioners' discovery began on

July 17, 1973, when Robert Howard, President of Centronics, was deposed in Nashua, New Hampshire. Nine depositions were taken from July 19, 1973 to September 6, 1973. Five Officers and Directors were deposed in Miami, Florida, two in Los Angeles, California, and one in Las Vegas, Nevada.

Petitioners had desired to depose all respondents in Miami in late July, but directors C. Perlman, McElnea, and Polite were not made available at that time. (See Motion, Brief, and Affidavit in Support of Continuance, Rec. pp. 92-100).

During the period when this discovery was taking place (less than two months) the following were being considered by the Court:

1. Respondents' C. Perlman and Polite motion for protective Order and affidavit in support of that motion. Filed July 23, 1973. (Rec. pp. 83-87).

2. Respondents' motion to require security for costs and accompanying affidavits and brief. Filed August 16, 1973. (Rec. pp. 265-271).

3. Interrogatories to petitioners. Filed August 22, 1973. (Rec. pp. 422-429).

4. Respondents' motion for summary judgment and accompanying affidavits and brief. (Rec. pp. 438-527). Filed August 27, 1973.

5. Petitioners' motion to compel discovery and accompanying affidavits and brief. Filed August 30, 1973. (Rec. pp. 665-671).

6. Petitioners' motion to amend complaint and drop a party and brief. Filed August 30, 1973. (Rec. pp. 672-677).

7. Petitioners' request for admission under Rule 36-second set. Filed August 30, 1973. (Rec. pp. 682-882).

8. Respondents' interrogatories with respect to the amended complaint. Filed September 4, 1973. (Rec. pp. 1101-1105).

All pleadings required replies and accompanying memoranda. In addition, petitioners' counsel had to be in Miami on August 31, 1973, when the court considered virtually everything that was outstanding (Rec. pp. 977-1075). C. Perlman's deposition and exhibits were submitted during the proceeding. (Rec. p. 1043). The court permitted the amended complaint to be filed (Rec. p. 1037) and permitted the original motion for summary judgment to relate to the amended complaint (Rec. p. 1037).

Further restraints were imposed because various documents were not made available until the C. Perlman deposition on August 15, 1973, and the William H. McElnea, Jr., deposition on September 6, 1973. Even at those depositions, documents were withheld from petitioners. (Rec. p. 1315). Documents requested in the deposition notice were not produced. In addition, Mr. Perlman's counsel deliberately obstructed the deposition by telling his client how the questions were to be answered. (See Rec. pp. 1380-1382). Although respondents' motion for protective order was denied, they failed to produce, forcing petitioners to file a motion to compel discovery. (Rec. pp. 655-671). Because of respondents' obstructions, petitioners were not allowed full access to relevant corporate minutes or other information which would have shown either the existence of "Exhibit C" to the contract or why respondents failed to prepare this vital document. It is respondents' failure to diligently execute "Exhibit C" that is the core of this action for corporate mismanagement.

Even though scheduling of the proceedings is obviously a matter within the discretion of the trial court, this discretion was abused. Because petitioners were caught in the bind of having to rush discovery, while at the same time being denied material facts which respondents concealed, petitioners were unable to gather materials through normal channels to effectively prepare and present their case. Thus, unlike *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), where there were 11½ *years* of discovery and where plaintiffs demanded

more discovery on theories only tangentially related to their case, petitioners here have been denied the right to discovery of material facts and documents.

Not only has *Poller*, *Hickman* and *Sartor's* holdings been unduly restricted by the trial court, but also the policy of the fifth and other circuits has been ignored.

> "To deny the plaintiffs the right to inspect and copy certain of the documents requested while at the same time permitting the defendants to support a Motion for Summary Judgment in great part by reference to these same records, clearly presents an inequitable situation from the standpoint of the plaintiffs. Whether or not there is an issue of fact remaining to be tried in this case can only be determined by reference to the books and records of the defendants."

Toebelman v. Missouri-Kansas Pipeline Co., 130 F.2d, 1016, 1022 (3rd Cir. 1942), cited in *Slagle v. United States*, 228 F.2d 673 (5th Cir. 1956), *Loew's Inc. v. Bays*, 209 F.2d 610 (5th Cir. 1954).

> "Zeal to dispose of litigation, commendable itself, has resulted in deprivation of reasonable opportunity to make adequate preparation for trial."

Sutherland Paper Co. v. Grant Paper Box Co., 183 F.2d 926, 931 (3rd Cir. 1950).

The petition for certiorari should be granted to consider the policies this case presents.

II. The trial judge granted respondents' motion for summary judgment without reviewing petitioners' entire discovery record and without ruling on petitioners' motion to compel discovery, thus abridging petitioners' right to present a full case against summary judgment.

Rule 56(c) Federal Rules of Civil Procedure states that "judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and

admissions on file . . . show that there is no genuine issue as to any material facts" and judgment should be rendered by law. See e.g. *Poller, supra; Sartor, supra.* There has not yet been presented to this court, however, the question of to what extent the trial judge may abridge the opponent's right to present his case by granting summary judgment in the midst of opponent's discovery.

By the time of the hearing on the summary judgment motion, (August 31, 1973), the trial court had notice that petitioners were scheduled to take depositions of the president and a director of respondents' corporation, on September 6, *six days* after the hearing. These depositions were not filed with the court until November 12, 1973, some two months *after* summary judgment was granted. The lower court therefore made its decision without access to petitioners' entire discovery.

When faced with summary judgment motions in the midst of the opponent's discovery, other courts have ruled contrary to the 5th Circuit's view presented here and have permitted the opponent to finish discovery. For example, in *Smith Corona Marchant, Inc. v. American Photocopy Equipment Co.*, 217 F.Supp. 39 (S.D. N.Y. 1963), the trial court rejected defendant's motion for summary judgment prior to completion of the opponent's discovery.

> "Great caution should be exercised in granting of motions for summary judgment, as decisions on the merits must abide a full appraisal of all the relevant facts and issues. Until the pre-trial phases of the case, and in particular pre-trial discovery are complete, such an appraisal cannot be made."

217 F. Supp. at 40.

This philosophy has been approved and followed. See *International Latex Corp. v. Lexicon Products, Inc.*, 37 F.R.D. 524 (E.D. Pa. 1965); *Philco Corp. v. Radio Corp. of America*, 34 F.R.D. 453 (E.D. Pa. 1964); *Toebelman v. Missouri-Kansas Pipeline Co., supra*, 130 F.2d 1016.

Indeed, in this instant case the trial judge at the oral arguments himself expressed awareness of the necessity of allowing petitioners to complete their discovery:

> "THE COURT: Discovery goes ahead full speed. I don't know what the problem is with the depositions. As a matter of fact, if I rule on the summary judgment and you have had depositions that you have scheduled and you still want to take, the Court of Appeals will reverse it in five minutes because I did not let you take the depositions and consider them before I ruled.
>
> MR. KRAMER: The Court of Appeals never reverses anything in five minutes.
>
> THE COURT: They do summary judgments.
>
> MR. KRAMER: Do they?
>
> THE COURT: Unless they have had full discovery."

(Rec. p. 1064).

However, both the trial judge and the Court of Appeals failed to live up to the promise of full discovery before consideration of the motion for summary judgment.

If the trial court would have read the depositions of Polite and McElnea, it would have found facts precluding summary judgment. For example, Mr. McElnea stated that Clifford Perlman told him that Centronics desired to repurchase its stock prior to April 19, 1972, when Centronics formally notified CW of its intentions. (R. 1551). This would mean CW could have prepared the "Exhibit C" before notification by Centronics and thus voided Centronic's option to repurchase. Note that Mr. McElnea later denies this fact (R. 1560) but the issue is still presented and left undecided.

Petitioners' right to a full hearing on their case was

further abridged when the trial judge failed to rule on petitioners' motion to compel discovery. That motion was argued before the trial court at the same time as the arguments for summary judgment. The petitioners were thus unable to have determined their rights of further discovery which would have afforded them other possible avenues to seek additional facts to avoid summary judgment. Petitioners asked for and never received CW's minutes and by-laws and most important, a memorandum of a meeting between CW and Centronics held prior to the demand for recapture of CW's stock. (Record pp. 665, 1327-1328).

The situation facing the trial court is not new to lower courts, however. In *Morrison Flying Service v. Deming National Bank*, 340 F.2d 430 (10th Cir. 1965), the court was presented with a similar problem when the trial judge granted defendant's motion for summary judgment before ruling on plaintiff 's motion to compel answers to questions in depositions. In a ruling in conflict with the Fifth Circuit's holding in the present case, the Tenth Circuit reversed:

> "We do not conclude that these questions must be answered or that, if answered, they will finally permit Morrison to prevail in the case. The trial court should first have an opportunity to rule upon the matter. Nevertheless, some of this evidence may be very material for final disposition of the litigation . . . Moreover, Morrison may be able to prove a case under some [other] legal theory . . . its [other] theories . . . are sufficiently alleged in the complaint, and they, or some other legal or equitable theory, may find factual support from evidence available but not before the court at the time summary judgment was granted."

340 F.2d at 432.

Morrison has been followed by other district courts; the Third Circuit *(Cohen v. Proctor and Gamble Distributing Company*, 20 F.R.D. 596 (D. Del. 1957)), District of

Columbia Circuit (*Indian Lake Estates, Inc. v. Lichtman*, 27 F.R.D. 417) (D. Del. 1961)), and Seventh Circuit (*Flowers v. Sneath Glass Company*, 190 F.Supp. 665 (N.D. Ind. 1961)). The *Flowers* case is especially relevant since on facts similar to the instant case—a derivative suit for wasting of corporate assets in which defendant controlled material facts—the trial court denied defendant's motion for summary judgment while granting plaintiff's motion for production of documents.

> "[T]o deny the plaintiffs the right to inspect and copy certain of the documents requested, while at the same time permitting the defendants to support a Motion for Summary Judgment in great part by reference to these same records, clearly presents an inequitable situation from the standpoint of the plaintiffs."

Id. at 666. See also Moore 6 Federal Practice ¶56.17.

The present case cries out for this Court to exercise its supervisory powers over the lower courts to form a uniform rule on a matter of great importance—Rule 56, F.R.C.P. Petitioners urge that this Court consider expanding its line of cases from *Hickman*, *Sartor*, *Poller* and their progeny in order to limit the grounds on which a trial judge should be able to grant summary judgment in the middle of the opponent's pre-trial discovery proceeding. Petitioners urge that Rule 56 should not be so one-sidedly construed as to prevent a party from having his evidence and procedural motions from being considered by the trial court in its ruling on summary judgment.

III. The trial judge violated F.R.C.P. 56 by ignoring factual issues in dispute.

It is clearly the law that summary judgment should be entered only when the pleadings, depositions, affidavits and admissions filed in the case indicate that there is no genuine issue of material fact. Rule 56(c), F.R.C.P. *Poller*

v. Columbia Broadcasting Systems, supra; Adickes v. S. H. Kress & Co., supra; Greenberg v. General Mills Fun Group, Inc., 478 F.2d 254 (5th Cir. 1973); *Austad v. United States*, 386 F.2d 147 (9th Cir. 1967). The trial judge nonetheless ignored evidence favorable to plaintiffs in ruling that there was no material issue of fact.

The Court of Appeals quoted at length, in their adoption of the District Court Opinion from paragraph five (5) of the "Equipment lease" as follows:

"5. TRIAL PERIOD AND AGREEMENT AS TO RENT:

(a) Lessee shall use the equipment and accessories being leased to it under this agreement without charge for a period of six months *beginning on the day there is installed at the locations set forth . . . and operating sufficient equipment and accessories* to make the system . . . operate at least one twenty-one table and at least one craps table.

(b) Unless Lessee notifies Lessor *prior to the end of the six month trial period* that Lessee does not want to continue to use the equipment and accessories being leased hereunder, prior to the end of the six month period, Lessee and Lessor will execute and affix to this equipment lease, an Exhibit 'C' setting forth a monthly rent for the equipment and accessories being leased hereunder. *Neither Lessee nor Lessor will be required to execute such Exhibit 'C' except* that if Lessee will execute an Exhibit 'C' calling for a rent of at least $10,000 per month, Lessor will be required to execute such Exhibit 'C' for a rent of not more than $5,000 per month, Lessee will be required to execute such Exhibit 'C'.

(c) *If prior to the end of the six month trial period either party notifies the other that it does not wish to continue* operating the equipment and accessories

> . . . (i) promptly upon receipt of such notice Lessor will remove all such equipment and accessories, (ii) Lessor will reimburse Lessee for all costs . . . in excess of $3,500 reasonable incurred by Lessee in restoring the property and fixtures . . . ; and (iii) except as provided in clauses (i) and (ii) neither Lessee nor Lessor shall have any further obligations under this Equipment Lease or otherwise relating to the system . . ."

In addition, the lease provided:

> (d) If either Lessee or Lessor fails to execute an Exhibit 'C' to this Equipment Lease prior to the expiration of the six month trial period, (unless the failure of a party to execute an Exhibit 'C' is a violation of sub-paragraph (b) of this section, this Equipment Lease will terminate on the last day of the six month trial period and neither Lessee nor Lessor will have any further obligations under this Equipment Lease, except that Lessor will be required, promptly after the end of the six month trial period, to remove all equipment and accessories to which this Equipment Lease relates from the location set forth in Exhibit 'A' and to reimburse lessee for the costs of restoration as set forth in (c)(ii) above."

This agreement relates to the stock option issued to CW since under paragraph four (4) of that agreement, unless CW entered into the Exhibit "C" lease, Centronics could recapture 255,000 shares of its stock at cost. The relevant portions of the option are:

"4. Option to Centronics under Certain Circumstances.

> (a) If DPI and Centronics fail to execute an Exhibit 'C' to the Equipment Lease by or before the expiration or earlier termination of the six-month trial period provided for in Section 5(a) of the Equipment Lease,

> (i) promptly after the end of such six-month trial period or such earlier termination, Lum's shall notify Centronics of the number of Centronics Shares, if any, theretofore purchased by Lum's . . . Centronics will then have the option . . . to purchase up to 50% of the Centronics Share . . ."

It is clear that at any time prior to the end of the "trial period" CW could have executed the Exhibit "C" lease and ended Centronics right to recapture the stock. This was true under the agreements, but not true in fact since, as stated above, respondents in this case were negligent in that the Exhibit "C" never existed.

The court stated that the trial period never began since the equipment was not "placed in operation." This is not "undisputed" as the opinion states. CW's attorneys by letter dated February 23, 1972 indicated that the trial period was about to commence. (Rec. P. 748). Vice-President and Corporate Secretary Harry Wald's letter to Mr. Howard of Centronics on March 17, 1972, indicated that the test models of the Centronics equipment had been installed. (Rec. P. 801). He also advised the Nevada Gaming Control Board of his plans by letter of March 10, 1972. (Rec. P. 805). By letter of March 8, 1972, Mr. Wald states that installation of the equipment will take place on March 13, 1972. (Rec. P. 804). Ken Boulanger, systems analyst for Centronics, indicated by letter dated March 30, 1972, that Centronics was satisfied with the test. (Rec. P. 800). On April 5, 1972, he thanks CW for their cooperation during the test. (Rec. P. 798). A meeting had been held on March 29, 1972, at CW where the Centronics system "which had been in operation in the Casino" was discussed. (Rec. P. 812). Moreover, John Ford, CW's own data processing expert in a memorandum dated April, 1972, stated that "the preliminary testing of the Centronics Casino System, at Caesar's Palace, was recently completed" (Rec. P. 1458),[2] and ". . . It is not

2. This appears on page following R. 1458 which was not numbered.

clear, at this point whether the two weeks' testing just completed is considered to be a substitution for the six months, or merely a part of it." (Rec. P. 1462).

Clifford Perlman states in deposition and affidavit that he believed that the trial period had not started. (Rec. P. 1312 and P. 442).

Moreover, it must be realized that the whole discussion of the trial period may be irrelevant since CW could have executed the Exhibit "C" agreement before the trial period commenced.

It is the law of this Court and the circuits that the party seeking summary judgment has the burden of proving that there is no genuine issue as to any material fact and that he is entitled to summary judgment as a matter of law. *Poller, supra; Adickes v. S. H. Kress & Co., supra; Melancon v. Insurance Co. of North America*, 482 F.2d 1057 (5th Cir. 1973); *Steed v. Central of Georgia Ry. Co.*, 477 F.2d 1303 (5th Cir. 1973); *Leonard v. BHJK Corp.*, 469 F.2d 108 (D.C. Cir. 1972). Any doubts must be resolved in favor of the non-moving party. *Ozark Milling Co., Inc., v. Allied Mills, Inc.*, 480 F.2d 1014 (8th Cir. 1973); *Pitts v. Shell Oil Co.*, 463 F.2d 331 (5th Cir. 1972). Even if the Court surmises that the party against whom the motion is made is unlikely to prevail at trial, a summary judgment is still inappropriate. *Aulds v. Foster*, 484 F.2d 945 (5th Cir. 1973); *American Manufacturers Mutual Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 388 F.2d 272 (2nd Cir. 1967). In addition, it should only be granted when it is clear factually what the truth of the matter is. *Tuley v. Heyd*, 482 F.2d 590 (5th Cir. 1973); *Weiss v. Kay Jewelry Stores*, 470 F.2d 1259, 152 US App. D.C. 350 (D.C. Cir. 1972).

As shown above, there is a major dispute concerning the trial period. Since the trial court did not follow the standards for granting summary judgment of this Court, the circuit courts, and their own circuit, the petition for certiorari should be granted, as this Court did in *Norfolk Monument Co. v. Woodlawn Memorial Gardens, supra.*

IV. The Court incorrectly applied the Business Judgment Rule for Corporate Directors and Officers under Florida law.

The Court of Appeals notes briefly that in Florida, corporate directors have wide discretion in the exercise of business judgment in the performance of their duties. F.S.A. §608.09.

It further notes that "the decision of the corporate directors was indisputably a sound exercise of business judgment which, absent any allegations or showing of bad faith or fraud, is not judicially reviewable". 491 F.2d at 20. This is definitely not the law of Florida or the vast majority of the jurisdictions in the country. This is as it should be, for the officers and directors of a multimillion dollar, nationally traded corporation with thousands of stockholders should be accountable for more of their actions than those which are occasioned by bad faith or fraud. The liability of officers and directors is usually defined by such standards as "the business judgment rule" referred to in the Court of Appeals decision, ordinary negligence, or gross negligence. Most courts adhere to the ordinary negligence standard.

> "At least three-quarters of the jurisdictions use ordinary care as the standard in director negligence cases. More fully, they state the rule as 'that care that an ordinary prudent man gives to his own affairs.' As discussed above, some courts prefer to put it as the care that an "ordinary director" would devote to the business, but no significant difference in result has appeared from the two formulations."

Dyson, *The Director's Liability for Negligence*, 40 Ind. L.J., 341, 371 (1965)

The business judgment standard exists simultaneously with the ordinary or gross negligence standards. When a Court indicates that it will not interfere in matters of business judgment, it has assumed that reasonable diligence

has in fact been exercised. See *Factors that Limit the Negligence Liability of a Corporate Executive or Director*, Univ. of Ill. Law Forum 341 (1967).

The gross negligence standard is applied in a minority of jurisdictions, some of which use the phrase gross negligence, but mean ordinary negligence. See *McEwen v. Kelly*, 140 Ga. 720, 723, 70 S.E. 777, 779 (1931).

The "bad faith or fraud standard" while mentioned in a minority of jurisdictions has been interpreted to just another aspect of the negligence standard.

> "Although at first glance the judge seems to be saying that good faith is enough, he most probably meant that the conscientious exercise of judgment cannot be called negligence if it is erroneous since he held that no want of prudence was shown."

Dyson, supra, at 372.

The officers and directors here lacked "good faith" in their failure to enact the Exhibit "C" lease. Florida law makes allowances for this type of situation deeming the corporate directors and officers to be negligent in the performance of their duties.

The law of the jurisdiction was most recently stated in *Yarnall Warehouse and Transfer Inc. v. Three Ivory Brothers Moving Company*, 226 So.2d 887 (Fla. Ct. of App. 1969). In that case, *Yarnall* sought a decree declaring the approval of defendant Allied Van Lines directors of defendant *Three Ivory's* application for a branch office in Yarnall's territory to be contrary to Allied's bylaws and regulations. Yarnall was a stockholder in and an authorized agent for Allied. Allied's eighteen man board of directors initially approved the application on February 1, 1963. Yarnall's president and secretary protested the action and personally appeared before Allied's board on May 1, 1963, to make their positions known. Allied's board sent the matter back to its agency committee for reexamination. However, on May 3, the board affirmed its previous decision granting agency.

The evidence showed that the application was in proper form with all the necessary documentation. The entire process of committee recommendation and board approval was well within the confines of acceptable business practice. Against this background the court stated:

> "The management of corporate business is vested in the directors of the corporation, and Courts in Florida have given to directors wide discretion in the exercise of business judgment in the performance of their duties. A Court of equity will not attempt to pass upon questions of mere business expediency or the mere exercise of business judgment, which is vested by law in the governing body of the corporation. Citizens National Bank v. Peters, Fla. App. 1965, 175 So.2d 54; Orlando Orange Grove Co. v. Hale, 1935, 119 Fla. 159, 161 So. 284; 7 Fla. Jur., Corporations §§158, 281; 18 C.J.S. Corporations §520."

Yarnall Warehouse and Transfer Inc. v. Three Ivory Brothers Moving Co., supra at 890-891.

If there had been no adequate procedure, or if there had been a showing of bad faith or discrimination, the court would have reached a different result. At 891-892;

> "Yarnall cites derivative actions and quotes from 7 Fla. Jr. Corporations §159 p. 478, for the proposition that "the absence of actual fraud in wasting corporate assets is no defense to an action by minority stockholders." But this rule is applicable to actions against "directors and officers of the corporation if such officers and directors, by their gross misjudgment or ignorance have permitted or are continuing to permit an illegal misapplication or waste of corporate funds to the detriment of the corporation and its stockholders.
>
> * * *
>
> "We hold that under the circumstances in this case the lower Court was correct in not substituting

> its judgment for that of corporate management absent a clear showing of bad faith, discrimination or abuse of business judgment."

The law of the jurisdiction therefore clearly makes provisions for abuse of business judgment which is occasioned by gross misjudgment or ignorance. Older decisions comment directly on the issue. In *Sebring v. Skinner*, 100 Fla. 315, 129 So. 759 (1930), the Supreme Court of Florida ruled that a corporate director's inattention does not excuse him from negligence in failing to protect corporate assets. There, defendant Sebring's corporate officer executed a mortgage which failed to contain an agreed upon clause which would have released portions of land upon payment of certain sums of money. Because of this omission, Sebring was subsequently unable to make several advantageous sales involving the parcel of land, which resulted in financial injury.

The corporate officer and its attorney simply failed to check over the documents before they were executed. Even though there might have been law which would have forced the seller of the land to enter into a release clause, the negligence of the officer could not be excused.

> ". . . it seems to us that the circumstances averred in the answer in connection with this transaction were not such as to excuse the defendant through its officer from guarding the company's interest by merely reading the paper and checking its provisions. The officer of the defendant company notwithstanding his excuse that he was busy was not relieved from the duty of protecting his company's interest."

Sebring v. Skinner, *Id.* at 761.

Other Florida decisions, while recognizing the "wide discretion in the exercise of business judgment" given to corporate officers, make note of the distinction where the corporate officers are inattentive, negligent or grossly abuse their discretion. See *Orlando Orange Groves v. Hale*,

119 Fla. 159, 161 So.284; *Yarnall Warehouse and Transfer Inc. v. Three Ivory Brothers Moving Company, supra.*

The same standards apply when stockholders attempt to force the corporation to either instigate or settle law suits. *James Talcott, Inc. v. McDowell,* 148 So.2d 36 (Fla. Ct. of App. 1962); *Citizens National Bank of St. Petersburg v. Peters,* 175 So.2d 54 (Fla. Ct. of App. 1965)

Some Florida decisions appear to dispense with the "wide discretion in business judgment" rule and deal directly with what the court conceives to be the standard of diligence required of corporate directors. In *Skinner v. Hulsey,* 103 Fla. 713, 138 So.769 (1931), a trustee in bankruptcy brought an action on behalf of the creditors for personal decree against the directors for losses, damages, injuries, conversions, neglect and mismanagement of the corporation before it became bankrupt. Although the court denied relief because the complainants were creditors and not stockholders, the "generally accepted doctrine" of American courts was noted and accepted.

> ". . . the generally accepted doctrine of the American courts that directors of a business corporation who willfully abuse their trust, or misapply the funds of the corporation, or suffer the corporate property to be lost or wasted by gross negligence and inattention to their duties, may be held personally liable to make good the losses.
>
> * * *
>
> "Those who accept the position of directors in a corporation impliedly undertake to exercise ordinary care and diligence in the discharge of the duties thus committed to them. Even where the active transaction of business of the corporation is committed to duly authorized officers, this fact does not absolve the directors from the duty of reasonable supervision, and so it has been held generally by the courts that directors are liable for gross negligence or breach of duty resulting in injury."

Skinner v. Hulsey, supra, 138 So.769, 771-772; *McEwen v. Kelly*, 140 Ga. 720, 79 S.E. 777.

In actuality, gross negligence has been abandoned and replaced by the standard of ordinary negligence. See *Factors That Limit the Negligence Liability of a Corporate Executive or Director, supra.*

The officers and directors of CW by their inadvertence thus let a $9,000,000.00 asset slip away from the corporation's possession. No judgment was exercised whatsoever as the directors were plainly negligent in their duties. Florida law clearly allows shareholders to recover from the directors. By granting summary judgment, the court has condoned these actions which are plainly contrary to the law of the jurisdiction.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

MITCHELL A. KRAMER
Counsel for Petitioner

Of Counsel:
KRAMER and SALUS
313 South Seventeenth Street
Philadelphia, Pennsylvania 19103

APPENDIX A

Jacob SCHEIN and Marvin H. Schein,
Plaintiffs-Appellants,

v.

CAESAR'S WORLD, INC., et al., Defendants-Appellees.

No. 73-3702

Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

March 15, 1974.

Shareholders brought derivative action against corporate lessee and its officers and directors for alleged breach of their fiduciary duty. The United States District Court for the Southern District of Florida, Peter T. Fay, J., granted defendant's motion for summary judgment and the plaintiffs appealed. The Court of Appeals affirmed on memorandum opinion of lower court holding that decision of defendants not to attempt, by fixing rent due, to extinguish lessor's right to recapture stock, which lessee had purchased pursuant to option given in connection with lease, when lessor failed to place leased computer equipment in operation within requisite six months' period was sound exercise of defendants' business judgment and was not judicially reviewable absent allegations or showing of bad faith or fraud.

Affirmed.

1. CORPORATIONS ⇨ 310(1)

Management of corporate business is vested in the corporation's directors who have wide discretion in exercise of business judgment in performance of their duties. F.S.A. §608.09.

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* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al., 5 Cir., 1970, 431 F.2d 409, Part I.

2. CORPORATIONS ⇨ 310(1)

While corporation's directors are required to discharge their duties with the diligent care and skill which ordinarily prudent men would exercise under similar circumstances in like positions, directors incur no liability to the corporation for issues of business expediency which they resolve through the mere exercise of their business judgment. F.S.A. §608.09.

3. CORPORATIONS ⇨ 310(1)

Decision of officers and directors of corporate lessee not to fix rent due under equipment lease in an attempt to extinguish lessor's right to recapture stock, which lessee had purchased pursuant to option given in connection with lease, when lessor failed to place leased computer equipment in operation within requisite six months' period and their execution instead of compromise agreement with lessor constituted sound exercise of business judgment and action of the directors and officers was not judicially reviewable absent allegations or showing of bad faith or fraud. F.S.A. §608.09.

Appeal from the United States District Court for the Southern District of Florida.

* * *

Before COLEMAN, DYER and RONEY, Circuit Judges.

PER CURIAM:

Upon full consideration of the records and briefs in this case, the judgment of the District Court is affirmed on the memorandum opinion of Judge Peter T. Fay, dated September 12, 1973, hereto attached.

Affirmed.

APPENDIX

Opinion of District Court

FAY, District Judge.

Presented for judicial dispostion at the instant stage of this derivative action litigation is the Motion for Summary Judgment of the individual defendants, who are officers and directors of defendant Caesar's World, Inc., on whose behalf this cause was instituted. Antedating the Court's decision on defendants' motion has been an extensive review and analysis of plaintiff shareholders' grievances, as defined in their amended complaint and in oral argument before the Court, all discovery material and legal memoranda submitted by the parties to this cause, and, finally, a thorough study of the case law pertinent to the liability of corporate officers and directors for failure to use the care required of them by virtue of their corporate position. Mandated by such review and analysis is the granting of defendants' Motion for Summary Judgment.

[1, 2] Initially, it is to be noted that the management of corporate business is vested in the directors of a corporation, the directors having wide discretion in the exercise of business judgment in the performance of their duties. F.S.A., §608.09. While directors are required to discharge their duties with the diligent care and skill which ordinarily prudent men would exercise under similar circumstances in like positions, they incur no liability to the corporation for issues of business expediency which they resolve through the mere exercise of their business judgment. See e. g. Yarnall Warehouse and Transfer, Inc. v. Three Ivory Bros. Moving, Fla.App., 226 So.2d 887 (1969); Citizens Nat. Bank of St. Petersburg v. Peters, Fla.App., 175 So.2d 54 (1965). Thus, it is to an application to plaintiffs' cause of these controlling principles that this order now turns.

Plaintiffs, through their amended complaint, attribute

"diminution and/or wasting of Corporation assets" to the individual defendants as a result of defendants' alleged "negligence, inattention, carelessness, lack of diligence, lack of care, lack of skill of an ordinary prudent man, lack of ordinary care, failure to properly discharge fiduciary or quasi-fiduciary duties, and mismanagement. . . ." (Amended Complaint, para. 16) The genesis of such purported corporate waste and this lawsuit is a written "Equipment Lease" executed March 2, 1971, by Centronics Data Computer Corporation and Desert Palace, Inc., a wholly-owned subsidiary of defendant Caesar's World, Inc.

Pursuant to the lease, Centronics undertook to install a computerized casino system in the Caesar's Palace Casino operated by Desert Palace. Under the lease, either party had the right to terminate the agreement prior to the end of a six month's rent-free period commencing when "sufficient equipment and accessories" were "installed . . . and operating. . . ."

Simultaneously with, and as an inducement to, the execution of the Equipment Lease, Centronics assigned to Caesar's World an option to purchase 510,000 shares of Centronics stock, The right to recapture fifty percent of the stock, however, was retained by Centronics in the event of the termination of the equipment lease prior to the end of the six month period. While Centronics was endeavoring to install an operable casino system, the price of its stock began to rise. Consequently, Caesar's World exercised its option and purchased the 510,000 shares in September, 1971.

Relevant portions of the "Equipment Lease" provide as follows:

5. TRIAL PERIOD AND AGREEMENT AS TO RENT:

(a) Lessee shall use the equipment and accessories being leased to it under this agreement without charge for a period of six months *beginning on the day there is installed at the locations set forth . . . and*

operating sufficient equipment and accessories to make the system . . . operate at least one twenty-one table and at lease one craps table. . . .

(b) Unless Lessee notifies Lessor *prior to the end of the six month trial period* that Lessee does not want to continue to use the equipment and accessories being leased hereunder, prior to the end of the six month period, Lessee and Lessor will execute and affix to this equipment lease, an Exhibit "C" setting forth a monthly rent for the equipment and accessories being leased hereunder. *Neither Lessee nor Lessor will be required to execute such Exhibit "C" except* that if Lessee will execute an Exhibit "C" calling for a rent of at least $10,000 per month, Lessor will be required to execute such Exhibit "C" calling for a rent of not more than $5,000 per month, Lessee will be required to execute such Exhibit "C".

(c) *If prior to the end of the six month trial period either party notifies the other that it does not wish to continue* operating the equipment and accessories . . . (i) promptly upon receipt of such notice Lessor will remove all such equipment and accessories, (ii) Lessor will reimburse Lessee for all costs . . . in excess of $3,500 reasonably incurred by Lessee in restoring the property and fixtures . . .; and (iii) except as provided in clauses (i) and (ii) neither Lessee nor Lessor shall have any further obligations under this Equipment Lease or otherwise relating to the system. . . .

[3] It is undisputed that, because of unforeseen technical problems, the equipment and accessories comprising the subject casino system were never placed in operation. However, it is plaintiffs' simplistic position that because of the rise in value of Centronics' stock, defendants breached their corporate fiduciary duty by not acting—under 5(b) of the lease—to fix the rent under the Equipment Lease in an effort to extinguish Centronics' right to recapture its stock.

Presumably, plaintiffs would have had the corporate directors obligate Caesar's World to pay $10,000 per month for the full period of the lease for equipment which was not functional at the time and may never have been made operable.

Defendant directors did, in fact, offer to execute such an agreement. However, such offer was refused by Centronics, and, rather than insisting upon what plaintiffs now assert the rights of Caesar's World to have been under the Equipment Lease, the defendant directors settled a dispute between Caesar's and Centronics—which dispute arose in April, 1972, following the sharp increase in the price of Centronics stock—as to each corporation's right under the lease and assignment agreements. Under the compromise agreement, Centronics was permitted to purchase 100,000 shares out of the 250,000 it had claimed, waiving any claim to the remainder of the shares and agreeing—which it had previously refused to do—to register the stock, a prerequisite to Caesar's World's ability to sell the volatile stock.

It is patently obvious to this Court that in executing the compromise agreement, the directors of Caesar's World fulfilled their corporate duties with the diligent care and skill which ordinarily prudent men would exercise under similar circumstances in like positions. While not passing on the merit of the contention, a persuasive argument could be made that Caesar's right to require execution of "Exhibit C", thus foreclosing Centronics from recapturing one-half of its stock, did not ripen until the commencement of the six month trial period. Under the terms of the Equipment Lease, the trial period was commenced:

> . . . beginning on the day there is installed at the locations set forth . . . and operating sufficient equipment and accessories to make the system . . . operable. . . .

Since it is undisputed that the subject equipment and accessories were never in operation, Centronics could have legitimately contended that its right to recapture the stock

was absolute in view of the lease's provision that either party could terminate its contractual obligations upon notice to the other party at any time "prior to the end of the six month trial period. . . ." Further, even the execution of "Exhibit C" by Centronics under the circumstances heretofore delineated could have subjected that instrument to attack on the basis of fraud or overreaching by Caesar's World.

Thus, faced with the prospect of protracted litigation —in which Caesar's World might not prevail—over the contractual rights of the parties to unregistered volatile stock whose value might plummet as spectacularly as it has risen, the defendant directors executed a compromise agreement with Centronics. (While it is not dispositive of the issue at bar, it is noteworthy that an immediate profit of $6,767,000, on a $1,700,000 investment, accrued to Caesar's World as a result of the compromise.)

Vested with the management of the business of Caesar's World, it was incumbent upon the corporate directors to evaluate the relative risks of alternative courses of action. Accordingly, the decision of the defendant directors was indisputably a sound exercise of their business judgment which, absent any allegations or showing of bad faith or fraud, is not judicially reviewable. These principles were recently enunciated as follows:

> . . . The management of corporate business is vested in the directors of the corporation, and Courts in Florida have given to directors wide discretion in the exercise of business judgment in the performance of their duties. A Court of equity will not attempt to pass upon questions of mere business expediency or the mere exercise of business judgment, which is vested by law in the governing body of the corporation. Yarnall Ware & Tr., Inc. v. Three Ivory Bros. Mov. Co., *supra*, 226 So.2d at 890-891; Citizens National Bank v. Peters, Fla.App. 1965, 175 So.2d 54; Orlando Orange Groves Co. v. Hale, 119 Fla. 159, 161 So. 284; 18 C.J.S. Corporations §520; 7 Fla.Jur., Corporations §§158, 281.

Thus, plaintiffs have been accorded the opportunity to present their cause and offer testimony and evidence as to their claims. A thorough review of all presentations of the parties, in addition to all depositions and pleadings filed, conclusively establishes the lack of any factual issues to be tried in this litigation. Accordingly, summary judgment is hereby granted in favor of the defendants, Caesar's World, Inc., Clifford S. Perlman, Stuart Z. Perlman, William H. McElnea, Jr., Jay E. Leshaw, Harold E. Campbell, Jr., Bertin J. Perez, Richard A. Sheehan, Jr., L. John Polite, Jr. and Melvin Chasen, and against the plaintiffs, Jacob Schein and Marvin H. Schein, defendants being so entitled as a matter of law.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 73-343-Civ-PF

JACOB SCHEIN and
MARVIN H. SCHEIN,
Plaintiffs

v.

CAESAR'S WORLD, INC.,
et al.,
Defendants

MEMORANDUM OPINION
AND
FINAL SUMMARY JUDGMENT

Presented for judicial disposition at the instant stage of this derivitive action litigation is the Motion for Summary Judgment of the individual defendants, who are officers and directors of defendant Caesar's World, Inc., on whose behalf this cause was instituted. Antedating the Court's decision on defendants' motion has been an extensive review and analysis of plaintiff shareholders' grievances, as defined in their amended complaint and in oral argument before the Court, all discovery material and legal memoranda submitted by the parties to this cause, and, finally, a thorough study of the case law pertinent to the liability of corporate officers and directors for failure to use the care required of them by virtue of their corporate position. Mandated by such review and analysis is the granting of defendant's Motion for Summary Judgment.

Initially, it is to be noted that the management of corporate business is vested in the directors of a corpora-

tion, the directors having wide discretion in the exercise of business judgment in the performance of their duties. F.S.A., §608.09. While directors are required to discharge their duties with the diligent care and skill which ordinarily prudent men would exercise under similar circumstances in like positions, they incur no liability to the corporation for issues of business expedience which they resolve through the mere exercise of their business judgment. See e.g. *Yarnall Warehouse and Transfer, Inc. v. Three Ivory Bros. Moving*, Fla. App., 226 So.2d 887 (1969); *Citizens Nat. Bank of St. Petersburg v. Peters*, Fla. App., 175 So.2d 54 (1965). Thus, it is to an application to plaintiffs' cause of these controlling principles that this order now turns.

Plaintiffs, through their amended complaint, attribute "diminution and/or wasting of Corporation assets" to the individual defendants as a result of defendants' alleged "negligence, inattention, carelessness, lack of diligence, lack of care, lack of skill of an ordinary prudent man, lack of ordinary care, failure to properly discharge fiduciary or quasi-fiduciary duties, and mismanagement. . . ." (Amended Complaint, para. 16) The genesis of such purported corporate waste and this lawsuit is a written "Equipment Lease" executed March 2, 1971, by Centronics Data Computer Corporation and Desert Palace, Inc., a wholly-owned subsidiary of defendant Caesar's World, Inc.

Pursuant to the lease, Centronics undertook to install a computerized casino system in the Caesar's Palace Casino operated by Desert Palace. Under the lease, either party had the right to terminate the agreement prior to the end of a six month's rent-free period commencing when "sufficient equipment and accessories" were "installed . . . and operating. . . ."

Simultaneously with, and as an inducement to, the execution of the Equipment Lease, Centronics assigned to Caesar's World an option to purchase 510,000 shares of Centronics stock. The right to recapture fifty percent of the stock, however, was retained by Centronics in the event of the termination of the equipment lease prior to the end of the six month period. While Centronics was endeavoring

to install an operable casino system, the price of its stock began to rise. Consequently, Caesar's World exercised its option and purchased the 510,000 shares in September, 1971.

Relevant portions of the "Equipment Lease" provide as follows:

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(b) Unless Lessee notifies Lessor *prior to the end of the six month trial period* that Lessee does not want to continue to use the equipment and accessories being leased hereunder, prior to the end of the six month period, Lessee and Lessor will execute and affix to this equipment lease, an Exhibit "C" setting forth a monthly rent for the equipment and accessories being leased hereunder. *Neither Lessee nor Lessor will be required to execute such Exhibit "C" except* that if Lessee will execute an Exhibit "C" calling for a rent of at least $10,000 per month, Lessor will be required to execute such Exhibit "C" calling for a rent of not more than $5,000 per month, Lessee will be required to execute such Exhibit "C".

(c) *If prior to the end of the six month trial period either party notifies the other that it does not wish to continue* operating the equipment and accessories . . . (i) promptly upon receipt of such notice Lessor will remove all such equipment and accessories, (ii) Lessor will reimburse Lessee for all

> costs . . . in excess of $3,500 reasonably incurred by Lessee in restoring the property and fixtures . . . ; and (iii) except as provided in clauses (i) and (ii) neither Lessee nor Lessor shall have any further obligations under this Equipment Lease or otherwise relating to the system. . . .

It is undisputed that, because of unforeseen technical problems, the equipment and accessories comprising the subject casino system were never placed in operation. However, it is plaintiffs' simplistic position that because of the rise in value of Centronics' stock, defendants breached their corporate fidiciary duty by not acting—under 5(b) of the lease—to fix the rent under the Equipment Lease in an effort to extinguish Centronics' right to recapture its stock. Presumably, plaintiffs would have had the corporate directors obligate Caesar's World to pay $10,000 per month for the full period of the lease for equipment which was not functional at the time and may never have been made operable.

Defendant directors did, in fact, offer to execute such an agreement. However, such offer was refused by Centronics, and, rather than insisting upon what plaintiffs now assert the rights of Caesar's World to have been under the Equipment Lease, the defendant directors settled a dispute between Caesar's and Centronics—which dispute arose in April, 1972, following the sharp increase in the price of Centronics stock—as to each corporation's rights under the lease and assignment agreements. Under the compromise agreement, Centronics was permitted to purchase 100,000 shares out of the 250,000 it had claimed, waiving any claim to the remainder of the shares and agreeing—which it had previously refused to do—to register the stock, a prerequisite to Caesar's World's ability to sell the volatile stock.

It is patently obvious to this Court that in executing the compromise agreement, the directors of Caesar's World fulfilled their corporate duties with the diligent care and skill which ordinarily prudent men would exercise under

similar circumstances in like positions. While not passing on the merit of the contention, a persuasive argument could be made that Caesar's right to require execution of "Exhibit C", thus foreclosing Centronics from recapturing one-half of its stock, did not ripen until the commencement of the six month trial period. Under the terms of the Equipment Lease, the trial period was commenced:

> . . . beginning on the day there is installed at the locations set forth . . . and operating sufficient equipment and accessories to make the system . . . operable. . . .

Since it is undisputed that the subject equipment and accessories were never in operation, Centronics could have legitimately contended that its right to recapture the stock was absolute in view of the lease's provision that either party could terminate its contractural obligations upon notice to the other party at any time "prior to the end of the six month trial period. . . ." Further, even the execution of "Exhibit C" by Centronics under the circumstances heretofore delineated could have subjected that instrument to attack on the basis of fraud or overreaching by Caesar's World.

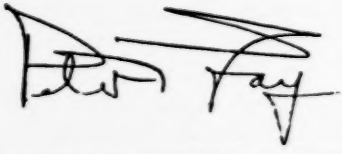
Thus, faced with the prospect of protracted litigation —in which Caesar's World might not prevail—over the contractual rights of the parties to unregistered volatile stock whose value might plummet as spectacularly as it has risen, the defendant directors executed a compromise agreement with Centronics. (While it is not dispositive of the issue at bar, it is noteworthy that an immediate profit of $6,767,000, on a $1,700,000 investment, accrued to Caesar's World as a result of the compromise.)

Vested with the management of the business of Caesar's World, it was incumbent upon the corporate directors to evaluate the relative risks of alternative courses of action. Accordingly, the decision of the defendant directors was indisputably a sound exercise of their business judgment which, absent any allegations or showing of bad faith or fraud, is not judicially reviewable. These principles were recently enunciated as follows:

> . . . The management of corporate business is vested in the directors of the corporation, and Courts in Florida have given to directors wide discretion in the exercise of business judgment in the performance of their duties. A court of equity will not attempt to pass upon questions of mere business expediency or the mere exercise of business judgment, which is vested by law in the governing body of the corporation. Yarnall Ware. *Yarnall Ware & Tr., Inc. v. Three Ivory Bros. Mov. Co., supra*, at 890-891; *Citizens National Bank v. Peters*, Fla. App. 1965, 175 So.2d 54; *Orlando Orange Grove Co. v. Hale*, 119 Fla. 159, 161 So. 284; 18 C.J.S. Corporations §520; 7 Fla. Jur., Corporations §§158, 281.

Thus, plaintiffs have been accorded the opportunity to present their cause and offer testimony and evidence as to their claims. A thorough review of all presentations of the parties, in addition to all depositions and pleadings filed, conclusively establishes the lack of any factual issues to be tried in this litigation. Accordingly, summary judgment is hereby granted in favor of the defendants, CAESAR'S WORLD, INC., CLIFFORD S. PERLMAN, STUART Z. PERLMAN, WILLIAM H. McELNEA, JR., JAY E. LESHAW, HAROLD E. CAMPBELL, JR., BERTIN J. PEREZ, RICHARD A. SHEEHAN, JR., L. JOHN POLITE, JR. and MELVIN CHASEN, and against the plaintiffs, JACOB SCHEIN and MARVIN H. SCHEIN, defendants being so entitled as a matter of law.

DONE AND ORDERED at Miami, Florida this 12th day of September, 1973.



UNITED STATES DISTRICT JUDGE

APPENDIX C

RULE 56. SUMMARY JUDGMENT

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

SUPREME COURT, U. S.

FILED

JUL 25 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1867

JACOB SCHEIN and MARVIN H. SCHEIN,

Petitioners,

v.

CAESAR'S WORLD, INC., CLIFFORD S. PERLMAN, STUART Z. PERLMAN, WILLIAM H. McELNEA, JR., JAY E. LESHAW, HAROLD E. CAMPBELL, JR., BERTIN J. PEREZ, L. JOHN POLITE, JR., and MELVIN CHASEN,

Respondents.

BRIEF OF RESPONDENTS, CLIFFORD S. PERLMAN, STUART Z. PERLMAN, WILLIAM H. McELNEA, JR., JAY E. LESHAW, HAROLD E. CAMPBELL, JR., BERTIN J. PEREZ, L. JOHN POLITE, JR., AND MELVIN CHASEN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM R. GLENDON
GUY C. QUINLAN
200 Park Avenue,
New York, New York 10017
Tel. No. (212) 972-7000

BERNARD S. MANDLER
Financial Federal Building
407 Lincoln Road—Suite 7B
Miami Beach, Florida 33139
Tel. No. (305) 534-8271

Attorneys for Respondents

Of Counsel:

ROGERS & WELLS
SMITH, MANDLER, SMITH & PARKER
MARY C. DALY

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Questions Presented

Petitioners do not accurately set forth the questions presented. The actual questions presented are:

1. Were the courts below correct in holding that summary judgment should be granted where, after petitioners completed all the depositions which they had requested, as well as extensive production of documents and requests for admissions, and had been offered the opportunity to con-

duct further depositions, but chose not to do so, petitioners were still unable to raise any genuine issue of material fact?

2. Were the courts below correct in holding that the Florida business judgment rule precluded review by the courts of a decision by corporate officers and directors to compromise a complex dispute, without litigation, where the undisputed facts showed that:

(a) the basis of Petitioners' complaint was an alleged failure to cause Caesar's World to execute a rental agreement with Centronics Data Computer Corporation, irrevocably committing Caesar's World to large rent payments for nonfunctioning equipment in order to protect a possible profit in a speculative stock;

(b) in any event Caesar's World did offer to enter into such a rental agreement, which Centronics refused; and

(c) Caesar's World compromised the resulting dispute with Centronics, at a profit to Caesar's World of over $6.7 million?

Statement of the Case

In an effort to simulate a question to warrant review by this Court, petitioners have directly misstated the facts in the record. It is simply not true, as asserted in the Petition (page 2), that "depositions were not completed" before the grant of summary judgment by the District Court, or that (*ibid.*, p. 10) the District Court "made its decision without access to petitioners' entire discovery". As further set forth below, the record shows that every deposition which petitioners requested had been completed, and had been considered by the District Court, when the motion for summary judgment was granted. The record further shows that petitioners were advised by the District Court

that they could conduct additional depositions if they so desired, and that petitioners made no request to do so.

The decisions below are clearly correct on the merits, and in any event raise no question which calls for review by this Court. In this diversity action, a derivative suit purportedly brought on behalf of Caesars World, Inc. ("CWI"), petitioners originally alleged that the officers and directors of CWI caused damage to the corporation by negligently making a late tender of a rental payment required under the lease for certain equipment (R. 4).* After discovery, petitioners were obliged to concede that the specific allegations of the original complaint were "incorrect or unproveable" (R. 677). Instead of withdrawing the action, however, petitioners amended the complaint and continued the case on a new and different theory. They were permitted to conduct further extensive discovery after the amendment, including oral depositions of all of the officers and directors of CWI. among others, and obtain voluminous production of documents, and two sets of requests for admissions. After permitting petitioners exhaustive discovery under their amended complaint, after examining the transcripts of all the depositions which petitioners had requested, and after offering petitioners the opportunity to conduct further depositions if they so desired, the District Court concluded that they had still failed to raise any triable issue of material fact, and the Court of Appeals summarily affirmed on the opinion below.

The facts as to the underlying transactions are fully set forth in the opinion of the District Court, upon which the Court of Appeals affirmed (491 F.2d 17), and need not be restated at length. Briefly, the subject matter related to two related contracts between CWI and Centronics Data Computer Corporation ("Centronics"). One of the contracts was an equipment lease ("the Lease"), under

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* References to "(R.)" are to pages of the record on appeal in the Court of Appeals.

which a wholly-owned subsidiary of CWI leased from Centronics a system of casino equipment. In order to induce CWI to execute the Lease, since the equipment system was untested and unproven, Centronics executed an assignment to CWI of an option to acquire a large block of Centronics stock ("the Assignment").

The Lease provided for a rent-free trial period of six months, to commence when a specified minimum amount of equipment was placed in operation, after which an agreement was to be executed fixing the rent (R. 471-73). Either party could terminate the Lease at will, at any time prior to the end of the trial period. However, the Assignment provided that, if the Lease were terminated by either party before reaching the rental agreement, Centronics would have the option to recapture up to 50 percent of the stock which CWI had acquired under the Assignment (R. 489-90).

Two major developments followed, neither of which had been foreseen by the parties in executing the agreement. First, due to technical problems, the equipment system installed by Centronics failed to function. The President of Centronics, examined as a witness by petitioners, testified that the minimum equipment specified in the Lease for commencement of the trial period was never placed in operation (R. 186). Meanwhile, the price of the Centronics stock which CWI acquired under the Assignment rose rapidly: by April, 1972, the stock which CWI had acquired at $3.33 a share was selling at $34.00 a share (R. 442). The stock could not be sold, however, until it had been registered, and Centronics did not act upon CWI's request for the preparation of a registration statement, to which CWI was entitled under the Assignment (R. 442).

Because of the sharp rise in the Centronics stock, CWI sought to extinguish Centronics' right to recapture that stock by offering to execute the rental agreement even though the equipment was not functioning (R. 442). Centronics, however also came to the conclusion that the stock became more valuable than the Lease (R. 166). Accordingly, Centronics

refused the rental agreement offered by CWI, and announced its intention to exercise the option to recapture 50 percent of the stock (R. 507). Centronics took the position that, since the minimum equipment had never been placed in operation there had never been a test period and Centronics had the absolute right to terminate (R. 169-170).

The management of CWI was thus faced with the prospect of litigation, during which its Centronics stock would have remained unregistered and unsalable. The Board of CWI was concerned that, even if it ultimately prevailed in litigation, the price of such a volatile stock could drop as sharply as it had risen (R. 445). Accordingly, the management of CWI decided that a negotiated settlement would serve the interests of the Corporation better than litigation. A compromise was negotiated under which Centronics purchased back at cost 155,000 shares, out of 255,000 shares it had originally claimed (leaving CWI with a total of 355,000 shares); Centronics waived its alleged right to purchase an additional 100,000 shares; and Centronics proceeded with the preparation of the registration statement previously requested by CWI (R. 517-20). CWI subsequently sold part of the Centronics stock at a net pre-tax profit of $6,767,000 (R. 446).

The original complaint herein alleged that CWI had been late in tendering a rental payment under the lease, that as a result of this late payment Centronics had claimed the right to repurchase 250,000 shares of the stock and that "after litigation" CWI turned over 150,000 shares of the stock to Centronics in settlement. As noted above, plaintiffs conceded after discovery that these original allegations were "incorrect or unproveable" (R. 677)*, but never-

* Petitioner Marvin Schein testified at his deposition that he had never seen the complaint herein before it was filed (R. 942), and that he could not have verified it in its original form, without additional information (R. 955). He further testified that he had not retained plaintiffs' attorney of record herein and literally did not know of that attorney's existence until shortly before his deposition was taken (R. 943).

theless continued extensive discovery proceedings in an effort to establish a claim on some other theory. In the course of these proceedings plaintiffs conducted and completed extensive discovery proceedings, including the Deposition of Robert Howard, the President of Centronics, as a nonparty witness; inspection of all Centronics documents relating to the CWI transaction (see R. 115-17; extensive additional documents were produced at Howard's deposition, but were not marked as exhibits by petitioners); the Deposition of Clifford Perlman, Chairman of the Board of CWI, who basically conducted the Centronics transaction for CWI; the Deposition of Stuart Perlman, Vice Chairman of the Board of CWI; the Deposition of William McElnea, President and a Director of CWI; the Deposition of Melvin Chasen, President of CWI at the time of the transactions; the Deposition of Bertin Perez, Treasurer of CWI; the Deposition of Richard H. Sheehan, Jr., Secretary and Corporate Counsel of CWI; the Deposition of J. E. Leshaw, Senior Vice President of CWI; the Deposition of L. John Polite, an outside Director of CWI; the inspection of CWI documents; and two sets of Requests for Admissions.

In the light of these facts, petitioners' claim that they were denied adequate discovery is clearly spurious. Further, petitioners' statement (page 2) that "depositions were not completed" is flatly untrue. The record herein shows that every deposition which petitioners indicated a desire to take was in fact taken, and completed. Further, the District Court made it clear that petitioners would be allowed to conduct any other depositions that they might request (R. 1064), but no such request was made.

After abandoning their original claim, based on the nonexistent late rental payment, petitioners argued in the District Court that the officers and directors had been negligent is not executing a rental agreement in order to extinguish Centronics' right to recapture the stock. This

contention, however, met two additional obstacles. First, such a transaction would have involved an obvious risk, since the Centronics stock could have fallen as sharply as it rose, leaving CWI saddled with a huge rental obligation for non-functioning equipment. At the argument on the motion, the District Court raised this question, which petitioners never undertook to answer (R. 1053):

> "The Court: What would the plaintiffs have said if they had entered into it on time, executed the Lease?
>
> "Mr. Kramer: They wouldn't have said anything.
>
> "The Court: Then all the stock started dropping in price and the equipment didn't work.
>
> "What would the plaintiffs then have said about the trial period and making certain that the equipment would work?
>
> "Mr. Kramer: It seems to me that at that point had the stock—You have to, of course, look at the stock, which is another factor. This is a company that we are dealing with—
>
> "The Court: You are looking at it with hindsight."

And further (R. 1055):

> "The Court: You do not think that stocks that go straight up also come straight down?
>
> "Mr. Kramer: They certainly do, Your Honor. They most certainly do. We have all had experience in that, to our great sorrow."

The second flaw in petitioners' amended claim was that the management of CWI, in fact, did seek to execute a rental agreement, and that Centronics refused to do so. This point, also, was never met by petitioners in the court below. Petitioners argue that CWI had an absolute right to execute the rental agreement, and to extinguish Centronics' right to the stock. CWI, in fact, took the same

position in its dispute with Centronics. But, when Centronics took a contrary position, the management of CWI was faced with a decision: whether to vindicate their position in the courts, letting CWI meanwhile take its chances on the rise or fall of the unregistered stock, or whether to compromise so that the stock could be promptly registered and sold. The District Court, in its opinion which was adopted by the Court of Appeals, set forth the position as follows (491 F.2d at 20):

> "Thus, faced with the prospect of protracted litigation—in which Caesar's World might not prevail—over the contractual rights of the parties to unregistered volatile stock whose value might plummet as spectacularly as it has risen, the defendant directors executed a compromise agreement with Centronics. (While it is not dispositive of the issue at bar, it is noteworthy that an immediate profit of $6,767,000, on a $1,700,000 investment, accrued to Caesar's World as a result of the compromise.)
>
> "Vested with the management of the business of Caesar's World, it was incumbent upon the corporate directors to evaluate the relative risks of alternative course of action. Accordingly, the decision of the defendant directors was indisputably a sound exercise of their business judgment which, absent any allegations or showing of bad faith or fraud, is not judicially reviewable."

Respondents submit that this decision was clearly correct, as a matter of Florida law, and that the present petition is without merit.

Reasons Why the Writ Should Be Denied

POINT I

Petitioners were Accorded Ample Opportunity to Conduct All Necessary Discovery, and Failed to Raise any Genuine Issue of Material Fact.

The authorities cited in the Petition, for the unquestioned proposition that discovery should be liberally allowed prior to granting summary judgment, are wholly inapplicable to the present action. The record herein discloses that petitioners were afforded ample opportunity to conduct discovery, and after doing so, were still unable to raise any genuine issue of material fact. As set forth above, petitioners conducted and completed every one of the depositions which they requested, including depositions of the Chairman of the Board, Vice Chairman, President, former President Secretary and Corporate Counsel, Treasurer, and outside directors of CWI. Although petitioners complain of their difficulties in obtaining CWI documents, it is not disputed that they did in fact obtain voluminous documents from CWI, even though the documents requested were largely irrelevant to the purported claim. Petitioners further requested, and obtained, extensive sets of admissions under Rule 36. Petitioners further took, and completed, the oral depositions of Centronics, as a nonparty witness, and conducted full inspection of Centronics' documents. Finally, the District Court made it clear that if petitioners wished to conduct still further depositions, they would be permitted to do so (R. 1063-65). Under these circumstances, the granting of summary judgment was fully warranted. *See, e.g., Chambers & Company* v. *Equitable Life Assurance Society*, 224 F.2d 338, 346 (5th Cir. 1955); *Waldron* v. *Cities Service Co.*, 361 F.2d 671, 673 (2d Cir. 1966), *aff'd sub nom. First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968).

Although petitioners were in fact accorded full discovery, the Petition seeks to create a contrary impression by mis-

stating and distorting the facts in the record. We have already noted the flatly untrue statement (Petition, page 2), that "depositions were not completed". Equally untrue is the assertion (Petition, page 12) that "Petitioners asked for and never received CW's minutes and by-laws": The record discloses that in fact Petitioners were furnished with the CWI board minutes relating to the Centronics transactions, and with a complete set of CWI's by-laws.

Petitioners are also disingenuous in alleging (Petition, page 10) that, because two of the depositions "were not filed with the court" until after disposition of the motion, "[t]he lower court therefore made its decision without access to petitioners' entire discovery." What petitioners omit to state is that, by agreement of counsel, copies of the depositions in question had been delivered directly to the District Judge, prior to the formal filing, and were before him when the motion was granted (R. 1596). The District Court expressly noted that, in passing on the motion, it had read and considered all of the discovery material submitted by the parties. 491 F.2d at 18.

Petitioners' contention (pages 13-18) that the courts below "ignored" issues of fact, is equally insubstantial. The "issues of fact" to which petitioners refer were issues that would have been presented if the management of CWI had chosen to litigate, rather than compromise, its claim against Centronics. The only issue presented in this action was whether, as a matter of Florida law, the business judgment of management in deciding to compromise the claim was subject to review in the courts. The District Court held that it was not, and it is submitted that this holding correctly stated the applicable state law.

POINT II

The District Court and the Court of Appeals correctly applied the Florida Business Judgment Rule.

Petitioners' contentions as to the application of Florida law to the instant facts (Petition, pages 18-23) would not call for review in this Court even if they were otherwise

well founded. The present action, despite some unusual factual features (*e.g.*, the situation of directors being sued for corporate waste on a transaction which earned the company a $6.7 million profit) is simply a garden variety, state law diversity suit for corporate waste. The application of the usual rules of state law in such cases, to the facts in this action, presents no appropriate subject for certiorari.

Further, petitioners' position is in fact without merit, and petitioners' argument on the state law issue is based upon a misstatement of the holding below. By quoting a part of one sentence from the District Court's opinion, out of context (Petition, page 18), petitioners seek to imply that the courts below held that the directors of a Florida corporation cannot be liable for negligence. As an examination of the opinion makes clear, this is simply not true. Thus, the District Court stated the controlling issue of Florida law in the following terms (491 F.2d at 18):

> "Initially, it is to be noted that the management of corporate business is vested in the directors of a corporation, the directors having wide discretion in the exercise of business judgment in the performance of their duties. F.S.A., § 608.09. *While directors are required to discharge their duties with the diligent care and skill which ordinarily prudent men would exercise under similar circumstances in like positions,* they incur no liability to the corporation for issues of business expediency which they resolve through the mere exercise of their business judgment. See e.g. Yarnall Warehouse and Transfer, Inc. v. Three Ivory Bros. Moving, Fla.App., 266 So.2d 887 (1969); Citizens Nat. Bank of St. Petersburg v. Peters, Fla.App., 175 So.2d 54 (1965). Thus, it is to an application to plaintiffs' cause of these controlling principles that this order now turns." [Emphasis supplied]

The District Court proceeded to apply these principles to the decision by CWI's management to compromise its

dispute with Centronics over the volatile Centronics stock. After reviewing the undisputed facts as to this decision, in the light of the record developed by petitioners' voluminous discovery, the court held (at 491 F.2d 19):

> "It is patently obvious to this Court that in executing the compromise agreemnt, the directors of Caesar's World fulfilled their corporate duties with the diligent care and skill which ordinarily prudent men would exercise under similar circumstances in like positions."

It is clear, we submit, that the courts below correctly stated and applied the applicable Florida law. *See e.g., Orlando Orange Groves Co.* v. *Hale,* 119 Fla. 159, 161 So. 284 (1935); *Citizens National Bank* v. *Peters,* 175 So.2d 54, 56 (Fla. Ct. of App. 1965); *James Talcott, Inc.* v. *McDowell,* 148 So.2d 36, 37-38 (Fla. Ct. of App. 1962). The fact that petitioners were driven to misstate the court's holding, in order to attack it, further indicates that its correctness is not seriously open to question.

CONCLUSION

For the reasons set forth above, the petition should be denied.

Respectfully submitted,

WILLIAM R. GLENDON
GUY C. QUINLAN
200 Park Avenue,
New York, New York 10017
Tel. No. (212) 972-7000

BERNARD S. MANDLER
Financial Federal Building
407 Lincoln Road—Suite 7B
Miami Beach, Florida 33139
Tel. No. (305) 534-8271
Attorneys for Respondents

Of Counsel:
ROGERS & WELLS
SMITH, MANDLER, SMITH & PARKER
MARY C. DALY

APPENDIX

Opinion of the United States Court of Appeals for the Fifth Circuit

491 F.2d 17

Before COLEMAN, DYER and RONEY, Circuit Judges.

PER CURIAM:

Upon full consideration of the records and briefs in this case, the judgment of the District Court is affirmed on the memorandum opinion of Judge Peter T. Fay, dated September 12, 1973, hereto attached.

Affirmed.

APPENDIX

Opinion of District Court

FAY, District Judge.

Presented for judicial disposition at the instant stage of this derivative action litigation is the Motion for Summary Judgment of the individual defendants, who are officers and directors of defendant Caesar's World, Inc., on whose behalf this cause was instituted. Antedating the Court's decision on defendants' motion has been an extensive review and analysis of plaintiff shareholders' grievances, as defined in their amended complaint and in oral argument before the Court, all discovery material and legal memoranda submitted by the parties to this cause, and, finally, a thorough study of the case law pertinent to the liability of corporate officers and directors for failure to use the care required of them by virtue of their corporate position. Mandated by such review and analysis is the granting of defendants' Motion for Summary Judgment.

[1, 2] Initially, it is to be noted that the management of corporate business is vested in the directors of a corporation, the directors having wide discretion in the exercise of business judgment in the performance of their duties. F.S.A., § 608.09. While directors are required to discharge their duties with the diligent care and skill which ordinarily prudent men would exercise under similar circumstances in like positions, they incur no liability to the corporation for issues of business expediency which they resolve through the mere exercise of their business judgment. See e. g. Yarnall Warehouse and Transfer, Inc. v. Three Ivory Bros. Moving, Fla.App., 226 So.2d 887 (1969); Citizens Nat. Bank of St. Petersburg v. Peters, Fla.App., 175 So.2d 54 (1965). Thus, it is to an application to plaintiffs' cause of these controlling principles that this order now turns.

Plaintiffs, through their amended complaint, attribute "diminution and/or wasting of Corporation assets" to the individual defendants as a result of defendants' alleged "negligence, inattention, carelessness, lack of diligence, lack of care, lack of skill of an ordinary prudent man, lack of ordinary care, failure to properly discharge fiduciary or quasi-fiduciary duties, and mismanagement . . . ." (Amended Complaint, para. 16) The genesis of such purported corporate waste and this lawsuit is a written "Equipment Lease" executed March 2, 1971, by Centronics Data Computer Corporation and Desert Palace, Inc., a wholly-owned subsidiary of defendant Caesar's World, Inc.

Pursuant to the lease, Centronics undertook to install a computerized casino system in the Caesar's Palace Casino operated by Desert Palace. Under the lease, either party had the right to terminate the agreement prior to the end of a six month's rent-free period commencing when "sufficient equipment and accessories" were "installed . . . and operating . . . ."

Appendix.

Simultaneously with, and as an inducement to, the execution of the Equipment Lease, Centronics assigned to Caesar's World an option to purchase 510,000 shares of Centronics stock. The right to recapture fifty percent of the stock, however, was retained by Centronics in the event of the termination of the equipment lease prior to the end of the six month period. While Centronics was endeavoring to install an operable casino system, the price of its stock began to rise. Consequently, Caesar's World exercised its option and purchased the 510,000 shares in September, 1971.

Relevant portions of the "Equipment Lease" provide as follows:

5. TRIAL PERIOD AND AGREEMENT AS TO RENT:

(a) Lessee shall use the equipment and accessories being leased to it under this agreement without charge for a period of six months *beginning on the day there is installed at the locations set forth . . . and operating sufficient equipment and accessories* to make the system . . . operate at least one twenty-one table and at lease one craps table. . . .

(b) Unless Lessee notifies Lessor *prior to the end of the six month trial period* that Lessee does not want to continue to use the equipment and accessories being leased hereunder, prior to the end of the six month period, Lessee and Lessor will execute and affix to this equipment lease, an Exhibit "C" setting forth a monthly rent for the equipment and accessories being leased hereunder. *Neither Lessee nor Lessor will be required to execute such Exhibit "C" except* that if Lessee will execute an Exhibit "C" calling for a rent of at least $10,000 per month, Lessor will be required to execute such Exhibit "C" calling for a rent of not more than $5,000 per month, Lessee will be required to execute such Exhibit "C".

> (c) *If prior to the end of the six month trial period either party notifies the other that it does not wish to continue* operating the equipment and accessories . . . (i) promptly upon receipt of such notice Lessor will remove all such equipment and accessories, (ii) Lessor will reimburse Lessee for all costs . . . in excess of $3,500 reasonably incurred by Lessee in restoring the property and fixtures . . . ; and (iii) except as provided in clauses (i) and (ii) neither Lessee nor Lessor shall have any further obligations under this Equipment Lease or otherwise relating to the system . . . .

[3] It is undisputed that, because of unforeseen technical problems, the equipment and accessories comprising the subject casino system were never placed in operation. However, it is plaintiffs' simplistic position that because of the rise in value of Centronics' stock, defendants breached their corporate fiduciary duty by not acting—under 5(b) of the lease—to fix the rent under the Equipment Lease in an effort to extinguish Centronics' right to recapture its stock. Presumably, plaintiffs would have had the corporate directors obligate Caesar's World to pay $10,000 per month for the full period of the lease for equipment which was not functional at the time and may never have been made operable.

Defendant directors did, in fact, offer to execute such an agreement. However, such offer was refused by Centronics, and, rather than insisting upon what plaintiffs now assert the rights of Caesar's World to have been under the Equipment Lease, the defendant directors settled a dispute between Caesar's and Centronics—which dispute arose in April, 1972, following the sharp increase in the price of Centronics stock—as to each corporation's rights under the lease and assignment agreements. Under the compromise agreement, Centronics was permitted to purchase 100,000 shares out of the 250,00 it had claimed, waiving any claim to the remainder of

the shares and agreeing—which it had previously refused to do—to register the stock, a prerequisite to Caesar's World's ability to sell the volatile stock.

It is patently obvious to this Court that in executing the compromise agreement, the directors of Caesar's World fulfilled their corporate duties with the diligent care and skill which ordinarily prudent men would exercise under similar circumstances in like positions. While not passing on the merit of the contention, a persuasive argument could be made that Caesar's right to require execution of "Exhibit C", thus foreclosing Centronics from recapturing one-half of its stock, did not ripen until the comencement of the six month trial period. Under the terms of the Equipment Lease, the trial period was commenced:

> . . . beginning on the day there is installed at the locations set forth . . . and operating sufficient equipment and accessories to make the system . . . operable . . . .

Since it is undisputed that the subject equipment and accessories were never in operation, Centronics could have legitimately contended that its right to recapture the stock was absolute in view of the lease's provision that either party could terminate its contractual obligations upon notice to the other party at any time "prior to the end of the six month trial period . . . ." Further, even the execution of "Exhibit C" by Centronics under the circumstances heretofore delineated could have subjected that instrument to attack on the basis of fraud or overreaching by Caesar's World.

Thus, faced with the prospect of protracted litigation—in which Caesar's World might not prevail—over the contractual rights of the parties to unregistered volatile stock whose value might plummet as spectacularly as it has risen, the defendant directors executed a compromise agreement with Centronics. (While it is not dispositive of the issue at bar, it is noteworthy that an immediate profit of $6,767,-

000, on a $1,700,000 investment, accrued to Caesar's World as a result of the compromise.)

Vested with the management of the business of Caesar's World, it was incumbent upon the corporate directors to evaluate the relative risks of alternative courses of action. Accordingly, the decision of the defendant directors was indisputably a sound exercise of their business judgment which, absent any allegations or showing of bad faith or fraud, is not judicially reviewable. These principles were recently enunciated as follows:

> . . . The management of corporate business is vested in the directors of the corporation, and Courts in Florida have given to directors wide discretion in the exercise of business judgment in the performance of their duties. A Court of equity will not attempt to pass upon questions of mere business expediency or the mere exercise of business judgment, which is vested by law in the governing body of the corporation. Yarnall Ware & Tr., Inc. v. Three Ivory Bros. Mov. Co., *supra,* 226 So.2d at 890-891; Citizens National Bank v. Peters, Fla.App.1965, 175 So.2d 54; Orlando Orange Groves Co. v. Hale, 119 Fla. 159, 161 So. 284; 18 C.J.S. Corporations § 520; 7 Fla.Jur., Corporations §§ 158, 281.

Thus, plaintiffs have been accorded the opportunity to present their cause and offer testimony and evidence as to their claims. A thorough review of all presentations of the parties, in addition to all depositions and pleadings filed, conclusively establishes the lack of any factual issues to be tried in this litigation. Accordingly, summary judgment is hereby granted in favor of the defendants, Caesar's World, Inc., Clifford S. Perlman, Stuart Z. Perlman, William H. McElnea, Jr., Jay E. Leshaw, Harold E. Campbell, Jr., Bertin J. Perez, Richard A. Sheehan, Jr., L. John Polite, Jr. and Melvin Chasen, and against the plaintiffs, Jacob Schein and Marvin H. Schein, defendants being so entitled as matter of law.